No. 94-1474

In The

Supreme Court of the United States

October Term, 1994

STATE OF IDAHO; PHIL BATT, GOVERNOR; PETE CENARRUSA, SECRETARY OF STATE; ALAN G. LANCE, ATTORNEY GENERAL; J.D. WILLIAMS, CONTROLLER; ANNE FOX, SUPERINTENDENT OF PUBLIC INSTRUCTION; KEITH HIGGINSON, DIRECTOR, DEPT. OF WATER RESOURCES; each individually and in his official capacity; IDAHO STATE BOARD OF LAND COMMISSIONERS; and IDAHO STATE DEPARTMENT OF WATER RESOURCES,

Petitioners,

v.

COEUR d'ALENE TRIBE, in its own right and as the beneficially interested party subject to the trusteeship of the UNITED STATES OF AMERICA; ERNEST L. STENSGAR, LAWRENCE ARIPA, MARGARET JOSÉ, DOMNICK CURLEY, AL GARRICK, NORMA PEONE and HENRY SIJOHN, individually, in their official capacity and on behalf of all enrolled members of COEUR d'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

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The State of Idaho and the other named defendants reply to the arguments raised in the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in this case.

ARGUMENT IN REPLY

1. Idaho Did Not Waive Its Eleventh Amendment Immunity To The Tribe's Action By Filing A Counterclaim In A Related Suit Initiated By The United States.

The Coeur d'Alene Tribe asserts that the Eleventh Amendment does not bar the Tribe's action because Idaho has filed a counterclaim asserting title to the disputed submerged lands in the case of *United States v. Idaho*, 94-0328 (D. Idaho). The Tribe's argument fails for several reasons. First, the Tribe's argument does not account for the different claims at issue in the two cases. The Tribe's original action sought title to all submerged lands within the boundaries of the Coeur d'Alene Reservation as it was originally established in 1873.[1] This included all of Lake Coeur d'Alene, approximately 20 miles of the Coeur d'Alene River, approximately 10 miles of the Spokane River, and approximately 6 miles of the St. Joe River.

After the dismissal of the Tribe's action, the United States brought a quiet title action against the State of Idaho, but limited its claim to the submerged lands within the *present* boundaries of the Coeur d'Alene Reservation,[2] thereby excluding the Spokane River, the Coeur d'Alene River, and two-thirds of Lake Coeur d'Alene. It also excluded the submerged lands within Heyburn State Park, which lies within the Reservation and includes a substantial portion of the Lake and the St. Joe River.

In response to the United States' action, the State filed an answer and counterclaim. The purpose of the counterclaim was to ensure that if the State prevailed in the action, it would receive a judgment quieting title to the disputed lands, instead of merely defeating the United States' claims. The State

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[1] *See* Executive Order of November 8, 1873 (hereinafter "1873 Executive Order").

[2] The boundaries of the Coeur d'Alene Reservation were substantially reduced by a cession agreement negotiated with the Tribe on September 9, 1889, and ratified by Congress on March 3, 1891. 26 Stat. 1027.

intentionally limited its counterclaim to the lands put at issue by the United States' action. This was in accordance with the generally accepted rule that counterclaims against the United States can only be in the nature of recoupment, and cannot enlarge the original action. 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1427 (1990). Thus, the State's counterclaim does not, as the Tribe asserts, raise the issue of ownership of the entire Lake, and does not submit the State to any adjudication by the federal courts beyond the risk of loss already placed upon it by the filing of the United States' action.

Nonetheless, the Tribe asserts that the filing of the counterclaim is an implicit voluntary submission to federal adjudication of all issues relating to the disputed submerged lands. It is true that the sovereign immunity embodied in the Eleventh Amendment may be waived by "voluntary submission" to the jurisdiction of the federal courts. *Clark v. Barnard*, 108 U.S. 436, 447 (1883). The fundamental flaw in the Tribe's argument, however, is that the State's appearance in *United States v. Idaho* was not voluntary. It is well-established that the federal government may bring actions against States in federal court without explicit state consent. *United States v. Texas*, 143 U.S. 621, 646 (1892). Thus, once the United States filed its action, the State was at risk of losing its title to the submerged lands claimed by the United States. By filing the counterclaim for the same lands put at issue by the United States' complaint, the State did not waive its Eleventh Amendment immunity in an entirely separate action involving a much greater risk of loss, both of submerged lands and damages in the form of attorney fees.[3]

In filing the counterclaim, Idaho also relied on prior decisions of the Idaho federal district court holding that the Attorney General, in representing the State of Idaho before

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[3] The Tribe's action presents a civil rights claim under 42 U.S.C. § 1983, which could require payment of the Tribe's attorney fees under 42 U.S.C. § 1988.

the federal courts, has no authority to waive Eleventh Amendment immunity. In the case of *Mazur v. Hymas*, 678 F. Supp. 1473 (D. Idaho 1988), the court found as follows:

> [T]he only official who could waive the State's immunity in a particular suit is the Attorney General. However, the Idaho Supreme Court has held that even the Attorney General has no authority to waive the State's sovereign immunity. *Howard v. Cook*, 59 Idaho 391, 397-98, 83 P.2d 208, 211 (1938). In *Howard*, the State was a defendant and counterclaimant. The Idaho Supreme Court stated that the Attorney General, by bringing a counterclaim, could waive the State's immunity, but only to the extent of giving the court jurisdiction to decide the State's counterclaim. The Attorney General could not waive sovereign immunity to allow plaintiffs to obtain affirmative relief against the State. *Id.* Since the Attorney General is powerless to wave Idaho's common law sovereign immunity in state court, *a fortiori* he is powerless to wave Idaho's eleventh amendment immunity. .

678 F. Supp. at 1474-75. *See also Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 467-70 (1945) (holding that Attorney General of Indiana lacked authority to waive state's Eleventh Amendment immunity and therefore dismissing action for lack of consent).

Given this prior decision, the filing of the counterclaim by the Idaho Attorney General cannot be construed as consent to the Tribe's action. Indeed, it would be an absurd result if the filing of a counterclaim in a federal action not subject to the restrictions of the Eleventh Amendment were to be construed as a waiver of immunity in separate actions brought by private parties simply because of the identity of issues. It would be even more absurd if the waiver were expanded to include issues not raised in the federal action.

The shortcomings in the Tribe's argument are demonstrated by its failure to identify a single case where the filing of a counterclaim in an action initiated by the United States has been found to waive state immunity in separate but

similar actions. The closest analogy is the situation where parties intervene or otherwise join actions brought by the United States against a State. In such circumstances, the private party cannot seek to enlarge the suit to include issues not raised by the United States. In *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), the Court noted that "the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes." *Id.* at 103 n.12. In other cases, the presence of the United States in an action has been held to only subject the defendant State to those liabilities raised in the federal complaint. For example, in *Arizona v. California*, 460 U.S. 605 (1983), the Court allowed several Indian tribes to intervene in an action brought by the United States against the States so long as the tribes "do not seek to bring new claims or issues against the States. . . . " *Id.* at 614. The Court reasoned that because the tribes did not seek to present any new claims or issues, but merely sought to participate, "our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Id.* That same reasoning does not apply in the present case, where the Tribe seeks to enlarge the federal district court's authority over the State by subjecting the State to new claims in an entirely separate action.

For the above reasons, there has been no waiver of Idaho's sovereign immunity in this action. The Eleventh Amendment issue presented by the State remains ripe for decision, and the Court should grant review for the reasons provided in the State's Petition.

2. The Idaho Supreme Court Has Never Limited Idaho's Sovereignty To Omit Immunity To Quiet Title Claims.

The Tribe asserts that the holding of the Idaho Supreme Court in *Lyon v. State*, 283 P.2d 1105 (Idaho 1955), defines Idaho's "sovereignty" in such a way that the Eleventh Amendment does not apply to quiet title actions against the State.

The Tribe bases its assertion on the following language from *Lyon*:

> A suit to quiet title to land allegedly owned by appellants and to which the Board of Education of the State of Idaho allegedly asserts a claim is not a claim against the Board of Education, or the State, to which it can interpose sovereign immunity as a defense.
>
> The appellants by the proceedings are asserting no claim against the sovereignty, but are attempting to retain what they allegedly own.

283 P. at 1106.

As explained more fully in the State's Brief in Opposition to Cross-Petition For A Writ Of Certiorari, the Tribe simply misreads *Lyon*. The Tribe's error is a classic example of what happens when a party extracts one or two sentences from an opinion without determining how those sentences were applied in the context of the facts of the case. *Lyon* does not limit Idaho's sovereignty. In fact, the court expressly stated that it was not reaching the issue of the State's sovereign immunity because all claims against the State had been abandoned on appeal. *Id.* at 1106.

The true holding in *Lyon* is that claims *against the Board of Education* are not claims against the State. The holding does not turn on common law principles of sovereignty applicable to all state agencies, but is derived from statutory waivers of sovereign immunity specific to the Board of Education. *See, e.g.*, Idaho Code §§ 33-3802, 33-3804 (1948) (Board of Education, in its role as Board of Regents of University of Idaho, is a corporate body and "a separate and independent legal entity" with authority to "sue and be sued"). Thus, by statute, suits against the Board are not suits against the State, as discussed in *State ex rel. Black v. State Bd. of Education*, 196 P. 201 Idaho (1921), one of the authorities cited in *Lyon*:

> [T]he board of regents is a constitutional corporation with granted powers, and while functioning within the scope of its authority, is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted, without authority to contract indebtedness against the state, and in no sense is a suit against the regents one against the state.

196 P. at 205.

The statement in *State ex rel. Black* clarifies the holding in *Lyon*. In both cases, the crucial fact is that the Board of Education is a separate entity with powers to sue and be sued, and therefore claims against the Board are not treated as claims against the State. Thus, the Tribe is simply wrong when it cites *Lyon* as authority for a general limitation of Idaho's sovereignty.

Even if the Tribe were correct in interpreting *Lyon* as a limitation of Idaho's sovereign immunity, it would not affect the State's immunity under the Eleventh Amendment. States must be free to define their sovereign immunity for internal purposes without worrying about the effect of such decisions on their Eleventh Amendment immunity. Thus, this Court has consistently held that a State's waiver of immunity within its own courts is "not determinative of whether [the State] has relinquished its Eleventh Amendment immunity from suit in the federal courts." *Edelman v. Jordan*, 415 U.S. 651, 677 n. 19 (1974). *See also Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) ("When a state authorizes a suit against itself in its own courts, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts"). Nothing in the *Lyon* decision indicates an intent to waive state immunity within the federal court system. Therefore, the Eleventh Amendment issue presented in the State's Petition is unaffected by the decision in *Lyon*, and review by writ of certiorari should be granted for the reasons provided in the Petition.

3. The Record In This Case Squarely Presents The Issue Of The President's Authority To Defeat A State's Equal Footing Title.

The Tribe asserts that the Court need not examine the authority of the President to defeat a state's equal footing title because there is no conflict between the Ninth Circuit's decision and this Court's prior cases. The Tribe's assertion is not based on any disagreement with the State's basic premise that executive orders are not generally recognized as conveyances of title to Indian tribes. Instead, the Tribe seeks to raise a series of peripheral issues that are apparently intended to convince the Court that congressional acts and state laws have vested the Coeur d'Alene Tribe with title to its Reservation and the submerged lands within it, therefore making it unnecessary to address the effect of the 1873 Executive Order. The Tribe's arguments do not withstand scrutiny.

The Tribe begins by alleging that the Tribe's title to the 1873 Reservation was "statutorily recognized" by Congress when it authorized payment to the Tribe for relinquishment of portions of the Reservation for settlement or for railroad right of ways. Such actions do not, however, distinguish the Coeur d'Alene Reservation from other executive order reservations. By the latter part of the nineteenth century, executive order reservations were common, and compensation was frequently granted to tribes for relinquishment of portions of such reservations. Such history, however, does nothing to undermine this Court's decision in *Sioux Tribe of Indians v. United States,* 316 U.S. 317 (1942), wherein the court distinguished "the character of title enjoyed by the Indians on statute and treaty reservations and that enjoyed by those on executive order reservations." *Id.* at 329. Indeed, the Court in *Sioux Tribe* rejected the plaintiff's argument that Congress, by treating executive order reservations the same as others, had recognized that tribes on all reservations hold the same "degree of ownership." *Id.* at 328-29. Thus, nothing in the congressional acts asserted by the Tribe demonstrate an understanding that the 1873 Executive Order conveyed title of submerged lands to the Tribe.

Secondly, the Tribe asserts that Idaho law at the time of statehood vested riparian landowners with title to adjacent submerged lands. The state cases cited by the Tribe as authority for this proposition, however, were later repudiated by the Idaho Supreme Court. *See Callahan v. Price,* 146 P. 732, 734-35 (Idaho 1915) (Idaho holds title to beds of all navigable waters); *Northern Pacific Ry. Co. v. Hirzel,* 161 P. 854, 859 (Idaho 1916) (noting that earlier decisions suggesting that riparian landowners owned adjacent submerged lands were "legislative" acts and "not judicial"). These holdings are conclusive on the federal courts. *Port of Seattle v. Oregon & Washington R.R. Co.,* 255 U.S. 56, 63 (1921) (decisions of state courts regarding property rights of riparian landowners in submerged lands conclusive on federal courts). Moreover, even if the Tribe's assertion is correct, it is irrelevant, since almost all of the riparian lands adjacent to the disputed waters have passed into private ownership. Only the present landowners would have a valid claim to riparian rights.[4]

Thus, the primary issue raised by the State in its Petition remains intact: may the President, acting without explicit congressional authorization, defeat a state's equal footing title

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[4] The other two issues raised by the Tribe are simply non-issues. The two Agreements referenced by the Tribe, which statutorily established the boundaries of the Coeur d'Alene Reservation, were ratified by Congress on March 3, 1891, eight months after Idaho was admitted to the Union and acquired equal footing title to all submerged lands within its boundaries. The ratification of the Agreements did not "relate back" to their dates of negotiation in 1887 and 1889. The authorization acts for both sets of negotiations expressly provided that any agreement negotiated was not to take effect until ratified. Act of May 15, 1886, 24 Stat. 29, 44; Act of March 2, 1889, 25 Stat. 980, 1002. Both agreements provided that they were not binding on either party until ratified by Congress. Act of March 3, 1891, 26 Stat. 989, 1029-30.

The Tribe also asserts that the disclaimer clause in the Idaho Constitution somehow vests the Tribe with title to the disputed submerged lands. The disclaimer clause, however, merely disclaims title to all lands "owned or held by any Indians or Indian tribes." Idaho. Const. art. 21, § 19. The clause does not act as an independent source of title to Indian lands, but simply recognizes the title vested in tribes pursuant to federal law.

by withdrawing lands for the use of Indian tribes? This issue has important implications, both for the immediate action and for state and federal relations in general. In the immediate action, the Ninth Circuit's decision establishes the threshold test that the Tribe must meet in order to prevail, and eases their burden of proof. More generally, the Ninth Circuit's decision, by recognizing presidential authority to abrogate the sovereignty guaranteed to the States under the equal footing doctrine, represents a substantial enlargement in the powers traditionally recognized to reside in the Executive. The State urges the Court to grant the petition for certiorari to hear this crucial issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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